THIRUCHELVASEGARAM MANICKAVASEGAR

v.

MAHADEVI NADCHATIRAM (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: S5-23-08-1997]
28 DECEMBER 2001

CIVIL PROCEDURE: *Stay of proceedings - Application for - Delay in filing notice of motion for stay - Failure to state statutory provisions under which application based upon - Failure to purge contempt before making application - Whether fatal to application*

CIVIL PROCEDURE: *Contempt of court - Rights of comtemnor - Whether contemnor can seek an order of court without first having purged his contempt - Exceptions*

CIVIL PROCEDURE: *Stay of proceedings - Stay of proceedings pending appeal - Whether appeal would operate as stay of proceedings - Whether appeal against procedural ruling and discretionary order would be rendered nugatory - Whether special circumstances to warrant a stay - Rules of the High Court 1980, O. 56 r. 1(4)*

On 31 May 2001, this court had, *inter alia*, allowed the plaintiff's application in encl. 234 to be heard first as opposed to the defendant's application in encl. 208 (reported in [2001] 3 CLJ 967). Enclosure 234 was the plaintiff's application to cross-examine the defendant and for leave to accept two affidavits that were technically irregular whilst encl. 208 was the defendant's application to set aside an *ex parte* order obtained by the plaintiff to issue committal proceedings against the defendant. This court also ordered that the cross-examination of the defendant be confined to the issue of service and to be carried out in open court on 15 and 16 January 2002. The defendant now applied in encl. 257 for a stay of proceedings pending her appeal to the Court of Appeal. The grounds of the defendant's application herein were: (1) that the defendant had filed the notice of appeal on 27 June 2001; (2) that the appeal to the Court of Appeal would be rendered nugatory; and (3) that there were special circumstances for the stay.

Held:

[1] The defendant filed the notice of motion for a stay on 24 August 2001, *ie*, about one month 27 days after the notice of appeal was filed and two months 23 days from the orders of this court dated 31 May 2001. An application for a stay should be made promptly. No reason was advanced by the defendant for the delay in filing the notice of motion for a stay. That being the case, it was crystal clear that the reasons for filing the notice of motion for a stay were to vacate the date for the cross-examination of the defendant, and to delay the whole proceedings. These legal manoeuvrings were tantamount to an abuse of the process of the court. (p 623 b-i)

[2] An order for stay would be dependant on the court's discretionary jurisdiction and it was the duty of the defendant to show special circumstances to warrant a stay. The defendant had failed to discharge that burden. That she challenged the validity or correctness of the court's orders on 31 March 2001; launched a personal attack in the course of her submission against the plaintiff; annexed the notice of appeal and the memorandum of appeal to the affidavit in support of the stay and marked them as exhibits; challenged the existence of the injunctive orders issued against her; and that there were merits in her appeal could not constitute special circumstances to warrant a stay. (pp 624 a-c & 625 d-h)

[3] The defendant in her notice of motion for a stay failed to state under which statutory provisions or under which provisions of the law she had applied for stay. That was a basic requirement which should be fulfilled and her failure to do so must necessarily give rise to the dismissal of her application with costs to be taxed. (p 624 e-g)

[4] By virtue of O. 56 r. 1(4) of the Rules of the High Court 1980, an appeal does not operate automatically as a stay of proceedings. (p 624 h-i)

[5] The *ex parte* order for leave granted to the plaintiff to issue committal proceedings against the defendant would tantamount to a finding of a *prima facie* case of contempt against the defendant. A person who is in contempt has no right to seek an order of the court until he has purged his contempt. To date the defendant had yet to purge her contempt and therefore had abused the process of the court by filing encl. 257 without first purging her contempt. (pp 626 b-i & 627 a)

[6] The notice of appeal revolved on the procedural rulings made by this court on 31 May 2001. Such appeals against procedural rulings are discouraged as they stand in the way of a speedy disposal of substantive trials and delay an expeditious result of the main proceedings *(Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal).* (p 627 g-h)

[7] The granting of leave to cross-examine the defendant was confined to the issue of service. The validity of service was a material issue and the defendant could not contend that that issue could be resolved without cross examination. Further, the order granting the said leave involved the exercise of the court's discretion. On an appeal from the grant or refusal of a discretionary order by the judge, the function of the appellate court is simply not to exercise an independent discretion of its own but instead, out of deference to the judge's exercise of his discretion, not interfere with the judge's discretion merely upon the ground that the members of the appellate court would have exercised the discretion differently. (pp 628 f-i & 629 a-b)

[8] A stay pending appeal can be refused on the ground that the substantive appeal has no merit and is doomed to fail *in limine*. In regard to the scope of cross-examination, the court can refuse to allow the cross-examination on the affidavit concerned if its scope is far too wide. Here, the cross-examination of the defendant was confined to issues alluded to in paras 6 and 7 of the enclosure concerned. Further, the dates for the cross-examination were fixed on 15 and 16 January 2002 and in the circumstances it would certainly be nugatory to order a stay. (pp 629 f-i & 630 a-e)

[Enclosure 257 dismissed with costs.]

Case(s) referred to:

Ajaib Singh v. Jeffrey Fernandez [1971] 1 MLJ 139 ***(foll)***
Atkins v. GW Ry [1886] 2 TLR 400 ***(refd)***
Balogh v. Crown Court at St Albans [1975] QB 73 ***(refd)***
Bettinson v. Bettinson [1965] Ch 465 ***(refd)***
Cambell Mussels v. Thompson [1984] Law Soc Gaz 2457 ***(refd)***
Cavendish v. Cavendish and Rochefoucauld [1866] 15 WR 182 ***(refd)***
Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 ***(refd)***
Chuck v. Cremer [1846] 1 Coop Temp Cott 205 ***(refd)***
Columbia Pictures Inc v. Robinson [1987] Ch 38 ***(refd)***
Comet Products UK Ltd v. Hawkex Plastics Ltd & Anor [1971] 1 All ER 1141 ***(dist)***
Curtis v. Curtis [1845] 5 Moo PC 252 ***(refd)***
Er Eng Hong & Anor v. New Kim Eng Dan Tiap-tiap Pemegang Yang Menduduki Atas Sebahagian Tanah Yang Dikenali Sebagai HS(M) 2162 PTD 4403 Mukim Benut, Daerah Pontian [2000] 1 CLJ 289 ***(refd)***
Garstin v. Garstin [1865] 4 Sw & Tr 73 ***(refd)***
Gordon v. Gordon [1904] P 163 ***(foll)***
Hadkinson v. Hadkinson [1952] Vol 2 All ER 567 ***(foll)***
Hadmor Productions Ltd & Ors v. Hamilton & Ors [1982] 1 All ER 1042 ***(foll)***
Harrison v. Harrison [1842] 4 Moo PC 96 ***(refd)***
Jademan (Holdings) Ltd v. Wong Chun-Loong [1990] 2 HKLR 577 ***(refd)***
Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(refd)***

Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(refd)***
Law Tim Wah v.PP [1978] 1 MLJ 167 ***(refd)***
Mahinder Singh v. PP [1967] 1 MLJ 126 ***(refd)***
Maril-Rionebel (M) Sdn Bhd v. Perdana Merchant Bankers Bhd [2001] 3 CLJ 248 ***(refd)***
Maynard v. Maynard [1984] FLR 85 ***(refd)***
MBf Capital Bhd & Anor v. Tommy Thomas & Anor (No 7) [1998] 4 CLJ Supp 72 ***(refd)***
Midland Bank v. Green (No 3) [1979] Ch 496 ***(refd)***
Morris v. Crown Office [1970] 2 QB 114 ***(refd)***
Muniandy & Ors v. PP [1966] 1 MLJ 257 ***(refd)***
PP v. Wong Yee Sen & Ors [1990] 1 CLJ 325; [1990] 2 CLJ (Rep) 902 ***(refd)***
Re Southern Equities Corporation Ltd (in liq); Bond & Anor v. England Vol 25 ACSR 552 ***(refd)***
Tac Construction & Trading v. Bennes Engineering Bhd (No 2) [1999] 2 CLJ 518 ***(foll)***
The Messiniaki Tolmi [1981] 2 Lloyds Rep 595 ***(refd)***
Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram [2001] 3 CLJ 967 ***(refd)***
Wardle Fabrics Ltd v. G Myristis Ltd [1984] FSR 264 ***(refd)***
Wee Choo Keong v. MBf Holdings Bhd & Anor & Another Appeal [1993] 3 CLJ 210 ***(foll)***
Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin Raja Hussin & Anor [1995] 3 CLJ 161 ***(refd)***
X Ltd v. Morgan-Grampian (Publishers) Ltd & Ors [1991] 1 AC 1 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 2, 138(2), 139, 140, 143, 145, 146, 147, 148, 149, 150, 151, 152
Rules of the High Court 1980, O. 56 r. 1(4)

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 37, paras 437, 439

For the plaintiff - Thiruchelvasegaram Manickavasegar; M/s M Segaram
For the defendant - Mahadevi Nadchatiram; M/s Mahadevi Nadchatiram & Partners

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Factual Background

It would be ideal to narrate the events surrounding the factual matrix of these proceedings. In chronological order, the events may be stated as follows:

(a) On 21 February 2001, an *ex parte* leave was granted to the plaintiff to issue committal proceedings against the defendant.

(b) On 24 February 2001, the plaintiff filed a substantive motion for committal.

(c) On 10 March 2001, the defendant applied to the Court of Appeal for a stay of the order made by the High Court on 22 January 2000. But the Court of Appeal refused to hear and forthwith dismissed the application with liberty to re-file.

(d) On 19 March 2001, the defendant filed the notice of motion in encl. 208 and sought for the following orders:

1. The *Ex-Parte* Order dated 21.02.2001 be set aside;

2. The costs of this application be borne by the plaintiff; (and)

3. Such further or other Order as the Court deems fit.

(e) On 30 April 2001, the plaintiff filed the notice of motion in encl. 234 for the following orders:

(1) The Plaintiff be given leave to cross-examine the Defendant, Mahadevi a/p Nadchatiram and any other deponent of affidavits on the contents of the affidavits affirmed and filed in this proceeding in connection with the proceeding for committal.

(2) Leave be granted to the Plaintiff pursuant to Order 41 Rules 4 and 9(2) of the RHC, 1980 to use the affidavit of the Plaintiff, Thiruchelvasegaram a/l Manickavasegar affirmed on 19/12/2000 and the affidavit of K. Valytham also affirmed on 19/12/2000 or any other affidavits, if any, notwithstanding the affidavits do not have the endorsement or comply with Order 41 Rule 9(2) of the RHC, 1980 by failing merely to state at the bottom of the affidavits the date of affirmation and (the) date of filing.

(3) Other reliefs as the Court may deem fit.

(4) Costs of and incidental to this application shall be the costs of the committal.

(f) On 31 May 2001, I made the following orders:

(1) The following words appearing in prayer (1) of enclosure 234 of the English version, namely:

'and any other deponent'

to be deleted and expunged.

(2) The following words appearing in prayer (2) of enclosure 234 of the English version, namely:

'or any other affidavits, if any,'

to be deleted and expunged.

(3) Enclosure 234 to be heard first as opposed to enclosure 208.

(4) The cross-examination of the defendant, Mahadevi a/p Nadchatiram, in relation to the amended prayer (1) of enclosure 234 must be confined to the issues as alluded to in paragraphs 6 and 7 of enclosure 233 and that exercise will be carried out or conducted in open court on 15 and 16 January 2002.

(g) On 27 June 2001, the defendant filed a notice of appeal against my decision dated 31 May 2001 and I have since written my judgment and that judgment has since been reported in the popular local law journal *vide Thiruchelvasegaram Manickavasegar v. Mahadevi Nadchatiram* [2001] 3 CLJ 967. The appeal has since been registered as Court of Appeal, civil appeal no: W-02-553-2001.

(h) On 24 August 2001, by way of a notice of motion that was filed by the defendant, the defendant sought for a stay of further proceedings until my appeal is heard by the Court of Appeal. That notice of motion can be seen in encl. 257 and in its original text the defendant prayed for:

(a) Segala prosiding di sini digantungkan sehingga pelupusan penuh dan muktamad rayuan defendan kepada Mahkamah Rayuan melalui rayuan sivil no: W-02-553-2001 terhadap keputusan Yang Arif Hakim yang diberikan pada 31hb Mei 2001.

(b) Kos.

(c) Lain-lain relif yang Mahkamah yang mulia fikir sesuai dan adil.

(i) It must be stressed that cross-examination of the defendant will be carried out in open court on 15 and 16 January 2002.

Arguments Of The Parties

Madam Mahadevi contended that both encls. 208 and 234 were not heard on its merits and that I had made a procedural ruling on 31 May 2001 that the defendant be cross-examined in open court. It was argued that by not making a finding on the two enclosures, the defendant was deprived of her right of appeal to the Court of Appeal on these two enclosures. It was her submission that the orders which I made on 31 May 2001 were in the nature of a procedural ruling as to which enclosure was to be heard first. She submitted that the plaintiff brought a string of lawyers who were "juggling on the submissions and blabbering in court" and in the process had "misdirected" this court. She then went into specifics. She submitted that the plaintiff had instituted the contempt proceedings on 19 December 2000 only after the defendant had obtained an order for sale of the plaintiff's wife's land in Nadchatiram Realities (1960) Sdn Bhd on 14 December 2000 in order to

satisfy the judgment dated 7 May 1997 to the extent of RM4.9 million. It was said that the plaintiff was furious and mercilessly decided to institute contempt proceedings in order to put fear into the defendant and force the defendant into a compromise not to sell the plaintiff's wife's property to Success Blossom Assets Sdn Bhd. It was also said that the plaintiff had falsely instituted Kuala Lumpur High Court S5-23-08-97 and S2 (S5)-23-04-97 in 1997 only after the defendant had obtained an order from the Supreme Court which held that the defendant's declaration of trust was valid. Madam Mahadevi continued with her submission and it was part and parcel of her submission that the two defamation suits were tactical manoeuvres by the plaintiff in that if the plaintiff's wife lost, the plaintiff could still succeed and recover the sums in the defamation suits. It was pointed out that my immediate predecessor had ordered the defendant to pay damages in the sum of RM3.5 million but on appeal, the Court of Appeal reduced the quantum to a mere RM500,000 and the Court of Appeal too had disallowed seven out of nine defamation claims and the tort of conspiracy. It was submitted that the claim that was allowed in favour of the plaintiff was based on a fabricated conspired allegation between the plaintiff and his wife's lawyer. In strong language, Madam Mahadevi described the plaintiff as a "contriver" who did not come to court with clean hands and she urged this court not to believe the plaintiff. She then described the plaintiff as a:

> vexatious and oppressive litigant who has filed multiplicity of suits against the defendant to deprive her of her inheritance and (who) has not informed the court that he has already sued her to the extent of RM140 million in the four suits.

She submitted that if a stay is not granted, this court is lending its aid to a contriver and a fraudulent litigant in the person of the plaintiff who has no scruples and who uses this court as a means to take personal revenge on the defendant. These were submissions not couched in temperate language. They were submissions that were designed to ridicule the plaintiff.

Be that as it may, Madam Mahadevi submitted that if this court proceeds with the cross-examination on 15 and 16 January 2002, then the defendant's appeal to the Court of Appeal would be rendered nugatory because the defendant is appealing against that very order that allows the plaintiff to cross-examine the defendant. On the balance of convenience it was submitted that the *status quo* ought to be maintained pending the full and final disposal of the appeal to the Court of Appeal otherwise irreparable damage would be caused to the defendant.

Madam Mahadevi alluded to the sealed order of the Court of Appeal dated 28 April 2001 which was annexed to her affidavit that was affirmed on 20 August 2001 and filed on 24 August 2001 as seen in encl. 256. Her affidavit in encl. 256 was in support of the notice of motion for a stay in encl. 257. Now, the sealed order of the Court of Appeal (exh. "MD9" of encl. 257) showed that there was no injunction against the defendant and flowing from this it was submitted that it was crucial that the defendant be granted a stay of all proceedings pending appeal to the Court of Appeal. It was her submission that there were special circumstances justifying a stay of all proceedings.

The plaintiff – Mr. Thiruchelvasegaram a/l Manickavasegar, affirmed an affidavit styled as an "Affidavit In Reply To The Defendant's Affidavit Affirmed on 20 August 2001 In Support Of The Motion For Stay" and that affidavit was affirmed on 3 September 2001 and filed on the same date as seen in encl. 258. It was an affidavit filed for the purpose of responding to encl. 256. Enclosure 258 was a point by point rebuttal of encl. 256. In encl. 258, the plaintiff deposed, *inter alia*, as follows:

(1) that the orders of this court dated 31 May 2001 concerned matters of discretion and the appeal filed by the defendant to the Court of Appeal was totally devoid of any merit.

(2) that there are decisions emanating from the Federal Court in relation to committal proceedings which held that the discretionary orders of the Judge on procedural matters regarding the decision of whether to hear which enclosure first ought not to be appealed and that such appeals, if launched, will not be entertained by the appellate courts.

(3) that the order of this court directing cross-examination of the defendant was entirely a discretionary order and that, after taking into account the facts and circumstances of the present case, the defendant's appeal to the Court of Appeal would be swiftly dismissed.

(4) that, in the circumstances, the appeal to the Court of Appeal has no merits at all and that the appeal was filed purely to delay the cross-examination of the defendant since the latter was reluctant to go inside the witness box and be cross-examined.

(5) that the defendant had not taken any positive steps to get the appeal heard by the Court of Appeal and the obvious reason that can be discerned was that the defendant was attempting to delay the cross-examination exercise that was scheduled on 15 and 16 January 2002.

(6) that the appeal to the Court of Appeal against the orders of this court dated 31 May 2001 was nothing but an abuse of the process of the court. It was the stand of the plaintiff that the defendant has chosen to appeal at every order in respect of an action instituted by the plaintiff and for these reasons the plaintiff was of the view that the stay should not be granted.

In encl. 258, the plaintiff deposed further. He averred that this court was willing to give a date for the cross-examination of the defendant in September 2001 but the defendant deliberately avoided by giving excuses and this court finally fixed the date for cross-examination in January 2002. He averred that from the affidavits, the purpose of the defendant was very clear: it was to avoid being cross-examined. In the context of a criminal case, Ong Hock Thye FJ (as he then was) in *Muniandy & Ors v. Public Prosecutor* [1966] 1 MLJ 257, 258 (FC) had this to say of cross-examination:

> In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not per se an all sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration.

The purpose of cross-examination is to elicit answers in favour of the opposing party and at the same time to weaken the evidentiary value of the witness. Subsection (2) of s. 138 of the Evidence Act 1950 provides that cross-examination must relate to relevant facts though it need not be confined to the facts to which the witness testified on his examination-in-chief. It is correct to say that generally the rules governing cross-examination are set out in ss. 138, 139, 140, 143, 145, 146 and 147 of the Evidence Act 1950. Sections 148 to 152 of the Evidence Act 1950 are quite useful – they are designed by the drafters to protect a witness against improper cross-examination. Faiza Thamby Chik JC (now judge) in *Public Prosecutor v. Wong Yee Sen and Ors* [1990] 1 CLJ 325; [1990] 2 CLJ (Rep) 902 (HC) sets out the objects of cross-examination. In style, his Lordship said:

> Cross-examination is the examination of a witness by the adverse party, that is, the party opposed to the one that calls him. What is the aim of cross-examination? Really there is one aim only. It is to assist in the administration of justice by revealing the truth to the court. The function of cross-examination is to eliminate or reduce the danger that a false conclusion will be reached. Wigmore has declared that cross-examination is beyond doubt the greatest engine ever invented for the discovery of truth.

The powers of a cross-examiner generally are:

(1) to ask leading questions (section 143 of the Evidence Act, 1950);

(2) to impeach a witness for making a previous inconsistent statement (section 145 of the Evidence Act, 1950);

(3) to test a witness's accuracy, veracity and credibility (section 146(a) of the Evidence Act, 1950); and

(4) to shake the credit of a witness by injuring his character (section 146(c) of the Evidence Act, 1950).

Ong Hock Thye FJ (as he then was) in *Mahinder Singh v. Public Prosecutor* [1967] 1 MLJ 126 FC placed emphasis on the answers elicited in cross-examination and this was what his Lordship said:

> It was not sufficient merely that the complainant appeared quite certain in his own mind that the accused was his assailant. It was clearly necessary for the court to examine also the grounds of his belief before regarding the question as closed. We have therefore, taken into consideration the complainant's answers elicited in cross-examination, which were undoubtedly material but which the judge had failed to take into account.

Lee Hun Hoe CJ (Borneo) (as he then was) in *Law Tim Wah v. Public Prosecutor* [1978] 1 MLJ 167, 168 FC had occasion to say that a party cannot complain about the admission of prejudicial evidence elicited in cross-examination. So much for the law. But I must sound a note of warning. It is this. That the Evidence Act 1950 cannot be applied and would not be applicable to an affidavit evidence. Two authorities may be cited for this simple proposition. The first would be s. 2 of the Evidence Act 1950 and the second would be based on the authority of *Tac Construction & Trading v. Bennes Engineering Berhad (No. 2)* [1999] 2 CLJ 518 of the report. That being the case, the authorities that revolved on the meaning of cross-examination which were adjudicated in the context of the Evidence Act 1950 must be read with care but nevertheless the principles distilled from these authorities are still germane and worth referring to.

Reverting back to the plaintiff's affidavit in encl. 258, it was averred that there were no merits to the defendant's appeal. It was averred that the defendant was not pursuing the appeal to be heard by the Court of Appeal expeditiously. It was also averred that the hearing of the appeal will not take a long time and that it could be disposed off quickly. The plaintiff held the view that any further appeals in respect of procedural points will not be entertained by the appellate courts. It was averred that the whole purpose of the stay that was sought by the defendant in encl. 257 was simply to delay the committal proceedings which ought to be heard expeditiously. It was further averred that the defendant's application for a stay was an abuse of the process of the court.

In regard to the issue of the injunctive orders, this was what the plaintiff had to say in his affidavit in encl. 258. The plaintiff deposed that it was wrong on the part of the defendant to say that there were no injunctive orders in existence as against the defendant. The plaintiff then referred to a court order dated 22 January 2000 emanating from my immediate predecessor which was exhibited and annexed to the plaintiff's affidavit in encl. 258 and marked as exh. "T1". That court order showed that permanent injunctions were granted both in respect of the Kuala Lumpur High Court civil suit no: S5-23-08-1997 and the Kuala Lumpur High Court civil suit no: S2 (S5)-23-04-1997. The plaintiff averred that the perfected final order of the Court of Appeal dated 28 April 2001 marked as exh. "T2" of encl. 258 which was the same as exh. "MD9" of encl. 257 showed that the Court of Appeal did not set aside or discharge the orders for injunctions granted by my immediate predecessor. The Court of Appeal by its order dated 28 April 2001 only allowed the appeal in part and upheld the third and the seventh defamation found by my immediate predecessor and substituted a sum of RM500,000 as damages. It was deposed that the seventh defamation upheld by the Court of Appeal was pleaded in Kuala Lumpur High Court civil suit no: S5-23-08-1997 and in that suit my immediate predecessor had granted the injunction. It was also deposed that the third defamation upheld by the Court of Appeal was pleaded in Kuala Lumpur High Court civil suit no: S2 (S5)-23-04-1997 and likewise in that suit my immediate predecessor had also granted the injunction. It was contended that the defendant was deliberately misleading this court when she submitted that there were no injunctions granted against her. It was averred that the defendant as a practising lawyer of 21 years standing ought to know in regard to the validity of court orders. An averment was made to the effect that the order of the court or a judge is valid and ought to be obeyed unless and until it is discharged by the appellate court. An averment was also made that the order of the High Court dated 22 January 2000 in regard to the injunctions, costs and other orders were maintained by the Court of Appeal. It was averred that there was no necessity for the Court of Appeal to grant the injunction on its own accord because the injunctions of the High Court had been maintained by the Court of Appeal. It was also averred that the defendant's purpose of claiming that there were no injunctions against her was to enable her to continue to publish the libels against the plaintiff. For these reasons, it was urged upon me that the notice of motion for a stay in encl. 257 ought to be refused.

The defendant respondent by filing an affidavit in reply that was affirmed on 20 September 2001 and filed on the next day as seen in encl. 267. In that affidavit, the defendant deposed that the only issue before this court on 31 May 2001 was whether this court should hear encl. 208 or encl. 234 and this court preferred to hear encl. 234 first as opposed to encl. 208. The defendant

deposed that she vehemently opposed the plaintiff's application to cross-examine her. The defendant also deposed that she is appealing to the Court of Appeal against the order that she be cross-examined in open court on 15 and 16 January 2002. It was deposed that the defendant's solicitors have written to the President of the Court of Appeal requesting for an early date. It was also deposed that this court gave the hearing date for the cross-examination of the defendant upon the insistence of counsel for the plaintiff. The defendant denied that she was avoiding being cross-examined in open court. The defendant averred that the plaintiff was making unfounded allegations against her. It was the stand of the defendant that she has a legal right to appeal and, in the circumstances, the plaintiff could not prevent the defendant from appealing. The defendant was still adamant and she held onto the notion that she had merits in her appeal. By way of a summary this was what the defendant deposed to in encl. 267 as far as encl. 257 was concerned:

(1) that her appeal to the Court of Appeal would be rendered nugatory if the stay was not granted;

(2) that in the interest of justice and to preserve the appeal the stay should be granted;

(3) that her application for a stay was not an abuse of the process of the court.

Not to be outwitted, the plaintiff affirmed an additional affidavit on 4 October 2001 as seen in encl. 269 and that affidavit contained interesting facts which should be reproduced here. It was deposed by the plaintiff that on 2 March 2001, the defendant had filed a motion for stay in the Court of Appeal *vide* civil appeal no: W-02-113-2000 after the plaintiff had obtained leave to take committal proceedings against the defendant. On 10 March 2001, the Court of Appeal struck off the defendant's motion for stay with liberty to re-file and the order of the Court of Appeal was annexed and exhibited as "T3" in encl. 269. It was deposed that the Court of Appeal had struck off the defendant's motion for stay on the grounds that the defendant was in contempt of court and that the defendant must purge her contempt before she could make any application for a stay.

The defendant affirmed an affidavit on 8 October 2001 which was also filed on the same date as seen in encl. 270 and this affidavit was in rebuttal to encl. 269. In that affidavit the defendant deposed that on 10 March 2001 her counsel was unable to attend the session before the Court of Appeal and so she was compelled to appear in person. The defendant deposed that before the Court of Appeal the plaintiff did raise an objection to the effect that she could not be heard and since her counsel was absent she was unable to reply to the plaintiff's argument. The defendant also deposed that she was advised by the Honourable judges of the Court of Appeal to withdraw her application for stay pending appeal and that she was given liberty to file afresh.

Analysis

Basically in the notice of motion in encl. 257, the defendant advanced the following grounds for the stay proper:

(i) that she has filed the notice of appeal on 27 June 2001;

(ii) that she asked for stay until the final disposal of the appeal fixed otherwise her appeal would be rendered nugatory; and

(iii) that there are special circumstances for the stay – but, unfortunately, no special circumstances were set out.

As I see it, the defendant averred in the various affidavits to the following effect:

(a) after narrating the events that had taken place that led to the filing of the notice of appeal against my decision dated 31 May 2001, the defendant proceeded to annex the notice of appeal (see exh. "MD5" of encl. 256) as well as the memorandum of appeal (see exh. "MD6" of encl. 256). The defendant then proceeded to contend that the appeal to the Court of Appeal would be rendered nugatory if this court were to proceed with the cross-examination of the defendant on 15 and 16 January 2002 (see para. 9 of the defendant's affidavit that was affirmed on 20 August 2001 as seen in encl. 256).

(b) in a nutshell by way of paras. 10 to 13 of encl. 256, the defendant ventured to state that there was no injunction granted against her by the Court of Appeal.

(c) no other grounds were ventured by the defendant in support of her application for a stay.

Should The Stay Be Allowed?

That would be the crucial question of the day. In her arguments the defendant thought it fit to contend and did contend that the committal proceedings that were undertaken were so taken without *bona fide* purposes and the defendant then proceeded to set out several grounds and all these grounds were framed to attack the plaintiff and the judgment of my immediate predecessor. That was certainly done in bad taste. The defendant too had the audacity to say that the plaintiff had brought "a string of lawyers who were juggling on the submissions and blabbering in court" and had "misdirected your Lordship". To me, these submissions by the defendant were not supported in tangible terms by the various affidavits filed by the defendant in support of the application for a stay. I was asked to hold that the personal attack on the plaintiff as alluded to in the early part of this judgment constituted, by itself,

a contempt of court. I must be cautious. I am acutely aware of the speech of Lord Denning MR in *Morris v. Crown Office* [1970] 2 QB 114 at 122; [1970] 1 All ER 1079 at 1081 and there his Lordship succinctly said:

> The phrase 'contempt in the face of the court' has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it, strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power – a power instantly to imprison a person without a trial – but it is a necessary power.

Then there was the speech of Stephenson LJ in *Balogh v. Crown Court at St. Albans* [1975] QB 73 at 91 where his Lordship described the contempt power as salutary as well as dangerous. To his Lordship it would be:

> ... salutary because it gives those who administer justice the protection necessary to secure justice for the public, dangerous because it deprives a citizen of the protection of safeguards considered generally necessary to secure justice for him.

There must always be wisdom and restrain in exercising the contempt power vested to a judge. This must be the paramount consideration that a judge should always harken to. Be that as it may, it was part and parcel of my judgment that to challenge the validity or correctness of my orders dated 31 May 2001 cannot be considered as special circumstances. I must, at this juncture, recapitulate the salient facts:

(1) On 21 February 2001, an *ex parte* leave was granted to the plaintiff to issue committal proceedings against the defendant.

(2) On 24 February 2001, substantive motion for committal was filed by the plaintiff.

(3) On 19 March 2001, the defendant filed the notice of motion in encl. 208 to set aside the *ex parte* order dated 21 February 2001.

(4) On 30 April 2001, the plaintiff filed the notice of motion in encl. 234 for leave to use the affidavits and to cross-examine the defendant.

(5) On 31 May 2001, after hearing the arguments of the parties, I made those orders as alluded to in the early part of this judgment and I set aside two days for cross-examination of the defendant, namely, on 15 and 16 January 2002.

(6) On 27 June 2001, the defendant filed a notice of appeal against my decision dated 31 May 2001.

(7) On 24 August 2001, the defendant filed a notice of motion for stay of further proceedings until the appeal is heard.

and it would be apparent that the defendant was dragging her feet and had failed to file the notice of motion for a stay promptly and the delay had tainted the application for a stay in that there was no *bona fide* on the part of the defendant. As a practising lawyer of 21 years standing the defendant ought to know that unless there is a stay the hearing of the cross-examination would proceed as scheduled. Yet the defendant filed the notice of motion for a stay on 24 August 2001 – some one (1) month and twenty-seven (27) days after the notice of appeal was filed (24 August 2001 minus 27 June 2001), and two (2) months twenty-three (23) days computed from my orders dated 31 May 2001 to the time when the notice of motion for a stay was filed on 24 August 2001. Yong J in the case of *Ajaib Singh v. Jeffrey Fernandez* [1971] 1 MLJ 139 had occasion to consider the need of being prompt when applying for a stay of a proceeding and his Lordship, in that context, observed at p. 140 of the report:

> In the Privy Council case of *Nawab S. N. Ally Khan v. Rajah O. Khan* (1865) LR 1 PC 8 at pp. 11 & 12, in which the appellant appealing from the order of the High Court which remitted the cause back to the Zillah Court for the trial of certain issues, applied, *inter alia*, to stay proceedings in the Zillah Court pending appeal, Lord Chelmsford said:
>
> > Any application for a stay of proceedings must be founded upon two points, which are essential to sustain the application; first, that a serious injury will be the result of the party applying unless the stay of proceedings is granted, and secondly, that the party has come promptly to make the application for delay.
>
> After consulting these and other authorities up to the present day I am of the opinion that an application for stay of proceedings should be made promptly, and it must be proved to the satisfaction of the court that special circumstances exist such as if the stay was not granted serious or irreparable injury would result to the party applying.

Indeed the delay was not explained by the defendant at all. No reason was advanced by the defendant for the delay in filing the notice of motion for a stay. That being the case, it was crystal clear that the reasons for filing the notice of motion for a stay were two folds. One, to vacate the date for cross-examination of the defendant. Two, to delay the whole proceedings. These legal manoeuvrings were tantamount to an abuse of the process of the court. In fact, it was an abuse of the process of the court. No special circumstances

were shown in the affidavits of the defendant to warrant a stay *(Wu Shu Chen (sole executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Hussin & Anor* [1995] 3 CLJ 161; *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161; and *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701, and since an order for a stay would be dependent on the court's discretionary jurisdiction, the duty of the defendant was to show special circumstances to warrant a stay. Sad to say the defendant had failed to discharge that burden. Certain passages appearing in the *Halsbury's Laws of England*, 4th edn, vol. 37, at para. 437 merit reproduction and I must reproduce them:

> A stay of proceedings arises under an order of the court which puts a stop or 'stay' or the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings. The object of the order is to avoid the trial or hearing of the action taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of the process. The order is made generally in the exercise of the court's discretionary jurisdiction, and by way of summary process, that is without a trial on the substantive merits of the case, and, at any rate in the exercise of its inherent jurisdiction, an order for the stay of proceedings is made very sparingly and only in exceptional circumstances.

Incidentally, it would be pertinent to point out that the defendant in her notice of motion for a stay in encl. 257 failed to state under which statutory provisions or under which provisions of the law she applied for a stay. This was certainly a basic requirement which the defendant should fulfil. In *Halsbury's Laws of England,* 4th edn, vol. 37, para. 439, the learned authors said:

> In all cases, the grounds on which the application is made must be clearly specified, stating whether it is made under a particular statute or rule of court or the court's inherent jurisdiction or a combination of these.

and the failure on the part of the defendant to specify the relevant provisions of the law in encl. 257 must necessarily give rise to one eventuality – the dismissal of encl. 257 with costs to be taxed.

It was emphasised by the defendant that there was an appeal pending to the Court of Appeal arising out of my orders dated 31 May 2001. But the law on this point is clear and beyond dispute. Order 56 r. 1(4) of the Rules of the High Court 1980 states that:

> Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

In *Tac Construction & Trading v. Bennes Engineering Berhad (No. 2) (supra)*, the court there considered both the special circumstances approach as well as the nugatory approach. At p. 531 of the report in *Tac Construction & Trading v. Bennes Engineering Berhad (No. 2)*, the court remarked:

> Of course, it goes without saying that it is the Judge that determines, on the facts, what are special circumstances. There must be materials before a Judge grants a stay.

and at p. 532 of the report in the same case, the court tersely said:

> Simply put, this approach is to prevent an appeal, if successful, nugatory.

By way of a summary, it is apt to state the law in these fashions and when so stated it would certainly shackle the defendant:

(1) An appeal does not operate automatically as a stay of execution.

(2) The validity or correctness of my orders dated 31 May 2001 cannot be considered as special circumstances. "Challenges against the incorrectness of the court's decisions in whatever forms cannot be considered as special circumstances" (*Tac Construction & Trading v. Bennes Engineering Berhad (No. 2) supra*, at p. 538 of the report).

(3) Personal attack launched in the course of the submission against the plaintiff cannot be construed as a special circumstance.

(4) Annexing the notice of appeal and the memorandum of appeal to the affidavit in support of the stay and marking them as exhs. "MD5" and "MD6" cannot be construed as special circumstances.

(5) Challenging the existence of the injunctive orders issued by the Kuala Lumpur High Court on 22 January 2000 in relation to civil suit no: S5-23-08-1997 and civil suit no: S2(S5)-23-04-1997 (see exh. "TI" of encl. 258) cannot constitute special circumstances.

(6) Merits in the defendant's appeal too cannot constitute special circumstances (*Atkins v. G.W. Ry* [1886] 2 TLR 400 as applied in *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366).

The upshot of it all was this. That the stay should not be allowed and to answer the question that was posed the answer would be that encl. 257 should be disallowed with costs to be taxed. In legal language, I would dismiss encl. 257 with costs to be taxed.

Lest I be accused of an oversight, I must now consider the other issues that were ventilated before me.

Purging Of The Contempt

It must be recalled that on 21 February 2001, an *ex parte* leave was granted to the plaintiff to issue committal proceedings against the defendant and that would be tantamount to a finding of a *prima facie* case of contempt against the defendant and so the defendant cannot be heard to say that the High Court had exercised that discretion to issue the *ex parte* leave wrongly until the defendant has purged her contempt. To date the defendant has yet to purge her contempt. In *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal* [1993] 3 CLJ 210 SC, Tun Abdul Hamid Omar LP had this to say at p. 212 of the report:

> Central in these appeals lies the important principle governing the rights, if any, of defendants who disobey orders of the court and then come forward to set aside the order disobeyed or to seek other relief from the court.

Further down the judgment and at p. 213 of the report, his Lordship Tun Abdul Hamid Omar LP succinctly said:

> Where the litigant shows himself to have little or no regard to an order issued against him, then he has to an extent, forfeited his right to be heard or at least, postponed that right until he has suitably purged his contempt.

and it can rightly be said that the defendant showed little disregard to the *ex parte* leave that was granted to the plaintiff to issue committal proceedings against the defendant which was, in fact, a finding of a *prima facie* case for contempt and for that reason the defendant has forfeited her right "to be heard" on her notice of motion in encl. 257 "until she has suitably purged her contempt."

Not having purged her contempt, the defendant sought a stay in encl. 257 which was an order in the nature of a discretion vested in the court. That stay was in regard to my orders dated 31 May 2001 which orders were entirely discretionary in nature. It was not open to the defendant to say that I had exercised my discretion wrongly when I made those orders on 31 May 2001 until she had purged her contempt. In *Gordon v. Gordon* [1904] P 163, Vaughan Williams LJ at p. 171 of the report made the same observations:

> I do not for one moment suggest that every matter of defence entitles a person in contempt to be heard; for instance, if an order has been made in the exercise of the discretion of the court, and someone is oppressed, or thinks himself oppressed, by that order appeals, saying that the court has exercised its discretion wrongly, that person if he is in contempt cannot be heard to say anything of the kind until he has purged his contempt.

In other words, a person who is in contempt has no right to seek an order of the court until he has purged his contempt. Incidentally, the speech of Vaughan Williams LJ in *Gordon v. Gordon (supra)* was cited with approval by Romer LJ in *Hadkinson v. Hadkinson* [1952] vol. 2, All ER 567, 570.

Misleading Submission By The Defendant

The defendant submitted that the order for the defendant to be cross-examined was made without the defendant being heard. In short, the complaint of the defendant was that she was not given a proper hearing by this court when this court ruled that encl. 234 was to be heard first as opposed to encl. 208. That was indeed an unkindest cut of them all. I was at great pains to write the judgment in question (see [2001] 3 CLJ 967 as alluded to in the early part of this judgment). No stones were left unturned. In the reported judgment especially at p. 994 of the CLJ reporting, I was very candid when I said:

> I reiterate that I have kept an open mind in deciding the present case. It was purely an exercise of my judicial discretion. I did not adjudicate on enclosure 208 or enclosure 234. In the context of the present exercise, I was called upon to decide whether to hear enclosure 208 first or enclosure 234 first. It was as simple as that.

Earlier on, I did say this (see the second paragraph of p. 994 of the CLJ reporting):

> Having heard the submissions of the parties through their learned counsel in the morning of 31 May 2001, I then adjourned and reserved my decision to the afternoon of the same day at 3pm.

and this very passage would negate the argument that the defendant was left totally in the cold. In fact, the defendant ventilated her arguments in open court with such fervour that I had to write expeditiously in order to keep pace with her oral submissions. Pure and simple, the notice of appeal dated 27 June 2001 revolved on the procedural rulings made by me on 31 May 2001. Now, an appeal against procedural ruling was frowned upon by Tun Abdul Hamid Omar LP in *Wee Choo Keong v. MBf Holdings Bhd & Anor and Another Appeal (supra)* and there his Lordship aptly said at p. 212 of the CLJ reporting:

> We would observe that this is clearly an appeal against mere procedural ruling. This court has always discouraged such appeals as they stand in the way of a speedy disposal of substantive trials and delay an expeditious result of the main proceedings.

Wee Choo Keong's case too was a case in regard to a procedural ruling. In that case before Justice Anuar J (as he then was) there were two enclosures. Enclosure 21 was filed by the defendant to set aside the *ex parte* injunction, while encl. 27 was filed by the plaintiff for committal for non-compliance of

the *ex parte* injunction (ie, the substantive notice of motion). The issue before his Lordship Anuar J (as he then was) was whether his Lordship should hear encl. 21 or encl. 27. After hearing lengthy submissions by counsel on both sides – just like what both counsel did before me on 31 May 2001, Justice Anuar J (as he then was) decided to hear encl. 27 first and thereafter hear encl. 21. Tun Abdul Hamid Omar LP in a lucid judgment held that there was nothing wrong in the ruling of Justice Anuar J (as he then was). In regard to the exercise of discretion by Justice Anuar J (as he then was), Tun Abdul Hamid Omar LP speaking for the then Supreme Court remarked that (see p. 213 of the report):

> It is an established principle that an appellate court will not interfere with the exercise of a discretionary jurisdiction of the court below unless that discretionary jurisdiction was not exercised judicially or was wrong in law. In these appeals, there is nothing to show that the learned judge had exercised his discretion wrongly. Nor is there any material before us to show that he was wrong in law or had erred in principle. The appellants have not altogether been barred from being heard on their applications to set aside the injunction. All that the High Court has done is to postpone the hearing of those applications until encl 27 has been disposed of. This the learned judge was manifestly entitled to do and his decision to so proceed is in our view entirely correct.

and the same reasonings would apply to the factual matrix of the present case. After hearing encl. 234, this court would proceed to hear encl. 208.

Miscellaneous Matters

In regard to the granting of leave to cross-examine the defendant which was confined to the issue of service, it was an order that involved the exercise of discretion. On discretion to order cross-examination, Gopal Sri Ram JCA in *Maril-Rionebel (M) Sdn Bhd (dahulunya dikenali sebagai Kredin Sdn Bhd) & Anor v. Perdana Merchant Bankers Berhad (dahulunya dikenali sebagai Intradagang Merchant Banks (M) Berhad) (and 4 Other Appeals)* [2001] 3 CLJ 248, at p. 265 observed:

> The decision whether or not to order cross-examination was within the discretion of the primary Judge. He exercised it in a particular way. On the available material, any reasonable tribunal similarly circumstanced would have arrived at the same decision.

I hasten to add that in the context of the present case, the dispute as to the validity of service of the substantive motion can only be settled by way of cross-examination. The validity of service was a material issue and the defendant cannot contend that this issue could be resolved without cross-examination. It is now well settled that on an appeal from the grant or refusal

of a discretionary order by the judge, the function of the appellate court is simply not to exercise an independent discretion of its own but instead the appellate court must, out of deference to the judge's exercise of his discretion, not interfere with the judge's discretion merely upon the ground that the members of the appellate court would have exercised the discretion differently. In similar vein, Lord Diplock had this to say in *Hadmor Productions Ltd and Others v. Hamilton and Others* [1982] 1 All ER 1042 especially at p. 1046 of the report:

> On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. I must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.

In *Re Southern Equities Corporation Ltd (in liq); Bond & Another v. England,* volume 25, ACSR 552 (Australian Corporations And Securities Reports), Lander J, refused to grant the stay of an order for examinations in the winding up proceedings on the ground that the applicants appeal for leave to appeal was unarguable and therefore stay should not be granted. At p. 559 of the report, his Lordship Lander J, concluded:

> In my opinion none of the grounds of appeal enjoy substantial prospects of success. Indeed, in my opinion, it cannot be said that the prospects are not insubstantial. In those circumstances it would not be appropriate to exercise the extraordinary jurisdiction to grant a stay.

In regard to the issue of a stay, reference may also be made to the case of *Er Eng Hong & Anor v. New Kim Eng Dan Tiap-Tiap Pemegang Yang Menduduki Atas Sebahagian Tanah Yang Dikenali Sebagai HS (M) 2162 PTD 4403 Mukim Benut, Daerah Pontian* [2000] 1 CLJ 289, where I categorically refused stay pending appeal on the ground that the substantive appeal had no merit and was doomed to fail in limine. At p. 310 of the report, this was what I said:

> In *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598, the Court of Appeal applied the nugatory approach and refused the stay as the pending appeal was obviously unarguable. The Court of Appeal was of the view that it was not a proper exercise of discretion to grant a stay as the substantive appeal lacked merit and was doomed to fail. Of course, the Court of Appeal in that case was dealing with a winding petition where it `ought to be prosecuted to a conclusion with all due speed'. Likewise here, although this was not a winding up petition, the substantive appeal had no merit and doomed to fail in limine.

In regard to the scope of cross-examination, I need to refer to the case of *Comet Products UK Ltd v. Hawkex Plastics Ltd and Another* [1971] 1 All ER 1141 CA, where the Court of Appeal refused to allow cross-examination of the second defendant's affidavit because its scope was far too wide. Lord Denning MR at p. 1145 remarked:

> So that brings me to the final question: ought a judge to rule that the second defendant should be cross-examined on his affidavit? It is to be remembered that this power to cross-examine is a matter for the discretion of the judge who is trying the case. I can understand that if the cross-examination could be limited to the particular circumstances of this alleged contempt, then it might be right to permit it. But in the course of the discussion, and particularly that of this morning, it has become plain that the plaintiffs, through their advisers, desire a much wider cross-examination than that.

It must be emphasised that the cross-examination of the second defendant on his affidavit in *Comet Products UK Ltd v. Hawkex Plastics Ltd and Another (supra)* raised collateral issues relating to the action as a whole and it was certainly different from our present case. Here, the plaintiff sought to cross-examine the defendant and it was "confined to the issues as alluded to in paras. 6 and 7 of encl. 233". Here too the dates for cross-examination were fixed on 15 and 16 January 2002 and in the circumstances it would certainly be nugatory to order a stay (*MBf Capital Bhd & Anor v. Tommy Thomas & Anor (No. 7)* [1998] 4 CLJ Supp 72).

Addendum

Reverting back to the court's discretion of not hearing the contemnor until the contempt is purged, it is indeed a good practice which should be maintained. He who is in contempt may not be heard further in the same litigation unless and until he has purged his contempt (*Chuck v. Cremer* [1846] 1 Coop. Temp. Cott. 205, 208; *Harrison v. Harrison* [1842] 4 Moo. PC 96, 13 ER 238; *Garstin v. Garstin* [1865] 4 Sw. & Tr. 73, 164 ER 1443; *Cavendish v. Cavendish and Rochefoucauld* [1866] 15 WR 182; *Hadkinson v. Hadkinson (supra)*; and *Bettinson v. Bettinson* [1965] Ch. 465). In *Curtis v. Curtis* [1845] 5 Moo PC 252, 256, 13 ER 487, 489, Lord Brougham succinctly said:

> It is a general rule of all courts, that no party shall be allowed to take active proceedings, if in contempt.

But there are exceptions to the rule. Thus, a contemnor may be heard on an application to purge his contempt or the contemnor may set aside the order breach of which had put him in contempt (*The Messiniaki Tolmi* [1981] 2 Lloyds Rep 595, 602) or the contemnor may appeal against the order of committal for lack of jurisdiction (*Gordon v. Gordon* [1904] P. 163 CA;

Hadkinson v. Hadkinson (supra); *Bettinson v. Bettinson (supra)*; *The Messiniaki Tolmi (supra)*; and *Maynard v. Maynard* [1984] FLR 85, 90 CA) or the contemnor would not be precluded from defending himself in the action itself (*Hadkinson v. Hadkinson (supra)*; and *Midland Bank v. Green (No: 3)* [1979] Ch. 496, 506). In *Wardle Fabrics Ltd v. G. Myristis Ltd* [1984] FSR 264; and in *Columbia Pictures Inc. v. Robinson* [1987] Ch. 38, the courts there rightly held that a defendant who is in breach of the terms of an Anton Piller order may seek by having the order set aside but all the same the defendant may still be punished for contempt. Adopting a robust approach, the House of Lords in the case of *X Ltd v. Morgan-Grampian (Publishers) Ltd and Others* [1991] 1 AC 1, 46, [1990] 2 WLR 1000 held that the question should be approached on the basis of a discretion which should be exercised flexibly, according to the circumstances, rather than on the basis of the rule. There was another view which said that the discretion ought to be exercised in the context of the particular facts of each case (*Cambell Mussels v. Thompson* [1984] Law Soc. Gaz. 2457, CA; and *Jademan (Holdings) Ltd v. Wong Chun-Loong* [1990] 2 HKLR 577).

By way of a preliminary objection the plaintiff argued that unless and until the defendant has purged her contempt, this court should not hear her on her application for a stay as reflected in encl. 257. I agree entirely with this submission. I decline to be flexible and, in the context of the present case, the discretion to hear the defendant without the defendant purging her contempt first cannot be exercised in the defendant's favour. In the words of Lord Bridge of Harwich in *X Ltd v. Morgan-Grampian (Publishers) Ltd and Others (supra)* it was an "abuse of the process of the court" for the defendant to file encl. 257 without first purging her contempt. At p. 1011 of the WLR report, his Lordship Lord Bridge of Harwich had this to say in X Ltd:

> The authorities bearing on the question of hearing a contemnor who has not purged his contempt were reviewed by Brandon LJ in *Astro Exito Navegacion S.A. v. Southland Enterprise Co. Ltd. (The Messiniaki Tolmi)* [1981] 2 Lloyd's Rep. 595. He expressed his conclusion as follows, at p. 602:
>
> > I accept that, while the general rule is that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt, there is an established exception to that general rule where the purpose of the application is to appeal against, or have set aside, on whatever ground or grounds, the very order disobedience of which has put the person concerned in contempt.
>
> But he added this qualification:
>
> > that there may be cases where an appeal by a party in contempt against the very order disobedience of which has put him in contempt, can be shown to be, for one reason or another, an abuse of the process of the court. In such a case the exception to the general rule discussed above would not apply.

Apart from a number of authorities in the 19th century, the only modern authority relied upon by Brandon LJ in reaching this conclusion was *Hadkinson v. Hadkinson* [1952] p. 285 in which passages from the judgment of Romer LJ, at pp. 288-289, directly support Brandon LJ's formulation of both the general rule and the exception to it.

Here, it was part and parcel of my judgment that the defendant had abused the process of the court by filing encl. 257 without first purging her contempt.

Conclusion

In so far as the preliminary objection was concerned, I ruled in favour of the plaintiff. In regard to encl. 257, I would dismiss it with costs to be taxed in view of the defendant's *prima facie* contempt.